No. 88-433

Supreme Court, U.S.
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OCT 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TERRYDALE LIQUIDATING TRUST,

Petitioner,

– against –

HERBERT BARNESS, JOHN F. BISHOP, EDGAR H. CHAPPELL, CHARLES W. CORBITT, GEORGE S. MANN, BROOKS WALKER, JR., LOUIS W. WALKER, and CHARLES M. WILLIAMS, individually and as Trustees of, and DAVID B. BRYANT as Trustee of, SAN FRANCISCO REAL ESTATE INVESTORS, and KEITH L. BROWN, individually, and SAN FRANCISCO REAL ESTATE INVESTORS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October 11, 1988

QUESTION PRESENTED

Whether, in this seven-year long litigation, the district court's decision on the merits, which followed a fourteen-day bench trial, and the court's subsequent $1.5 million contractual attorneys' fee award to respondents, should be set aside based upon petitioner's inflammatory and unsupported charges of "fraud on the court" and "witness tampering," raised for the first time long after the petitioner was aware of the matters complained of, when (i) the district court fully considered and rejected petitioner's claims on multiple occasions and (ii) the Second Circuit affirmed the district court's judgment in a *per curiam* opinion and ruled that petitioner's claims were "without any merit whatsoever."

LIST OF PARTIES
(Complete Case Caption Below)

TERRYDALE LIQUIDATING TRUST,
Plaintiff-Appellant,

-vs-

HERBERT BARNESS, JOHN F. BISHOP, EDGAR H. CHAPPELL, CHARLES W. CORBITT, GEORGE S. MANN, BROOKS WALKER, JR., LOUIS W. WALKER, and CHARLES M. WILLIAMS, individually and as Trustees of, and DAVID B. BRYANT as Trustee of, SAN FRANCISCO REAL ESTATE INVESTORS, and KEITH L. BROWN, individually, and SAN FRANCISCO REAL ESTATE INVESTORS, INC.,
Defendants-Appellees.

SAN FRANCISCO REAL ESTATE INVESTORS, INC., a Delaware corporation, successor in interest to San Francisco Real Estate Investors, a California real estate investment trust,
Counterclaimant and Third-Party Plaintiff,

-vs-

TERRYDALE LIQUIDATING TRUST, a New York business trust; TERRYDALE REALTY TRUST, a Missouri business trust; OLIVER R. GRACE, OLIVER R. GRACE, JR., EMILIO G. COLLADO, WILLIAM BOLTON, and ROBERT A. POSNER, individually and as Trustees of TERRYDALE LIQUIDATING TRUST; J. RUSSELL GRAMLICH, J. HARLAN STAMPER, THOMAS J. MURPHY, JOHN D. O'FLAHERTY, and JOHN J. GRAMLICH, individually and as Trustees of TERRYDALE REALTY TRUST; LINCOLN TOWER BUILDING CO., a Colorado partnership, SUBDALE CORPORATION, a New York corporation, MORRIS, LARSON, KING, STAMPER & BOLD, a Missouri professional corporation, HARRY A. MORRIS, ROY A. LARSON, THOMAS E. KING, J. HARLAN STAMPER, LAWRENCE R. BOLD, LYNN C. HOOVER, DONALD H. LOUDON, GORDON N. MYERSON, STEVEN H. GOODMAN, TOMMY W. TAYLOR, LAURENCE R. TUCKER, DAVID M. RHODUS, ROBERT B. KEIM, JACK W. ISLEY, JR., THOMAS R. LARSON, STEVEN G. EMERSON, GREGORY M. KRATOFIL, JOHN A. KOEPKE, and JOHN R. COCKLE, individually and as partners of MORRIS, LARSON, KING, STAMPER & BOLD,
Counterdefendants and Third-Party Defendants.

RULE 28.1 STATEMENT

1. San Francisco Real Estate Investors, Inc. changed its name to REIT of America, Inc. and subsequently was acquired by and merged into Unicorp American Corporation.

2. The parent company of Unicorp American Corporation is Unicorp Canada Corporation.

3. The partially owned subsidiaries and affiliates of Unicorp American Corporation are as follows:

Airport Hotel, Inc.
American Medical Buildings, Inc.
Lincoln Development, Inc.
Mark Resources, Inc.
Midland Doherty Financial Corporation
Precambrian Shield Resources Ltd.
Townsview Investments Limited
Townsview Properties Limited
Union Enterprises Ltd.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents San Francisco Real Estate Investors, Inc. and its directors (collectively, "SFREI") submit this brief in opposition to the petition for a writ of certiorari (the "Petition") filed by Terrydale Liquidating Trust ("TLT") seeking review of the Second Circuit's *per curiam* opinion affirming the judgment of the district court in this case. In its opinion, the Second Circuit summarily rejected, as "without any merit whatsoever," all the claims of impropriety raised in the Petition.

STATEMENT OF THE CASE

The pending petition for certiorari represents the culmination of seven years of litigation in which petitioner TLT has sought, without success, to recover a multi-million dollar award of damages and other relief against SFREI in connection with SFREI's role as a "white knight" in a hotly contested corporate takeover. After a fourteen-day bench trial in 1986, Judge Leonard B. Sand of the United States District Court for the Southern District of New York rejected each and every claim advanced by TLT. Moreover, Judge Sand subsequently ruled that TLT was liable to SFREI for its attorneys' fees and expenses — totalling more than $1.5 million — pursuant to the terms of so-called "prevailing party" clauses contained in certain contracts between SFREI and TLT's predecessor, Terrydale Realty Trust. Thus, what began as an effort by TLT to recover substantial damages from SFREI ended with SFREI recovering a significant monetary award from TLT.

After losing at trial, and faced with the prospect of a large judgment against it for SFREI's attorneys' fees and expenses, TLT desperately sought shelter. First, TLT brought a motion for sanctions against SFREI — the requested "sanction" being denial of all fees and expenses — on the ground that SFREI and its counsel had "defrauded" the court in connection with a motion to dismiss for lack of personal jurisdiction brought by SFREI at any early stage of the case and ultimately denied by the district court.[1] Next, TLT moved — more than one year after the trial in this action and on the eve of the entry of final judgment awarding SFREI its fees — to re-open discovery and for a new trial pursuant to Fed. R. Civ. P. 60(b) on the ground that SFREI and its counsel had allegedly "tampered" with witnesses in violation of the federal anti-bribery statute, 18 U.S.C. § 201. TLT sought relief vacating SFREI's judgment on the merits and again asked that SFREI's fee award be denied.

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[1] At the time of the motion to dismiss, SFREI was represented by the New York firm of Rogers & Wells and the San Francisco firm of Landels, Ripley & Diamond.

The district court rejected each and every one of TLT's spurious allegations. In fact, the district court rejected TLT's claims respecting SFREI's personal jurisdiction motion not once, but three times. As for TLT's outrageous and wholly unsupported claim of "witness tampering," Judge Sand stated that he had "regretfully reached the conclusion that the desire for delay, plus other emotional aspects which have entered into this case, are motivating [TLT's motion for a new trial]." (196a)[2] On appeal, a panel of the Second Circuit (Oakes and Miner, CJJ, and Pollack, DJ) affirmed the district court's judgment in all respects in a *per curiam* opinion, and found TLT's claims of a fraud on the court and witness tampering to be "without any merit whatsoever." (9a)

Despite the fact that TLT's claims have been resoundingly rejected both by the district court and by the Second Circuit, TLT persists in advancing these false allegations as the basis for its Petition. As is clearly revealed in Point III of TLT's Petition, its sole purpose continues to be its desire to escape from the judgment against it on the merits and from the $1.5 million fee award recovered by SFREI.

Unfortunately, the charges made by TLT in its Petition, though entirely without merit, are nothing new for TLT. Throughout the seven-year history of this litigation, charges of "fraud" and "deceit" have rolled regularly and lightly off TLT's tongue, and it has been ready with a charge of fraud or its equivalent to explain virtually every difficulty or adverse ruling it has suffered in this case.[3] In this manner, TLT has managed to accuse each

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[2] References to petitioner's separately bound Appendix are indicated by page number, followed by "a".

[3] Some of TLT's charges have been truly Kafkaesque. For example, in a memorandum of law dated July 23, 1984 in opposition to SFREI's renewed motion for summary judgment (which was granted in part by the district court), TLT accused SFREI of "concealing" or destroying documents — and asked the court to "infer" that SFREI was therefore liable to TLT — because no documentary proof of TLT's claims could be found. (Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment and in Support of its Countermotion

(Footnote continued)

of the three law firms which have represented SFREI of committing assorted "frauds on the court," and has also challenged the integrity of several of SFREI's directors.

TLT's mud-slinging charges have never once been found to have merit. As shown below, the claims in its Petition are wholly unsupported by the facts and the law, and raise no issues worthy of review by this Court.

A. *Background*

On January 9, 1981, BCG Associates ("BCG"), a New York limited partnership, made an unsolicited partial tender offer for 34% of the shares of Terrydale Realty Trust ("TRT"), a Kansas City, Missouri real estate investment trust or "REIT," at $33.50 per share in cash. The shares sought by BCG, when added to the 17.9% interest it already owned, would have given it absolute control of TRT. (4a, 17a)

With the assistance of experienced legal and real estate advisors, the TRT trustees reviewed the BCG offer and determined that, although the price was within the range of fairness (4a, 39a), it had numerous disadvantages for TRT's shareholders. (4a) Not the least of these was the fact that the BCG bid was only a partial offer, following which TRT shareholders would be left holding a minority interest in an entity in which majority control had passed to one party. (4a, 17a, 32a, 46a-47a) Accordingly, the TRT trustees determined to seek financial alternatives to the BCG offer that would be more advantageous to all of TRT's shareholders. (4a, 17a)

After holding discussions with at least eight different entities, including BCG, the TRT trustees determined (i) to sell TRT's four Denver office buildings, representing about 80% of TRT's

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for Partial Summary Judgment on Liability, p. 61) Earlier, at the deposition of Herbert Barness, a SFREI trustee, TLT's counsel accused SFREI's counsel of dereliction of his responsibilities for not preparing Mr. Barness to testify regarding certain facts which the witness testified he could not recall. (Transcript of Herbert Barness Deposition, pp. 100-104)

assets, to SFREI, at prices set forth in recently obtained appraisals, and (ii) to liquidate TRT and distribute the proceeds to shareholders. The proceeds of the sale to SFREI and liquidation of TRT yielded a total distribution to TRT shareholders of $33.85 per share for 100% of TRT's shares — a far better result for TRT's shareholders than that presented by BCG's partial offer. (4a-5a, 17a)[4]

Despite the announcement of TRT's "white knight" transaction with SFREI, BCG nevertheless continued with its tender offer for TRT shares. Through its tender offer (which was only partially subscribed) and a series of open market purchases thereafter, BCG was able, by January 1982, to obtain control of TRT, which by that time had been converted to a liquidating trust known as Terrydale Liquidating Trust, the petitioner herein. (5a-6a, 68a) BCG then caused TLT to sue the former TRT trustees and SFREI,[5] alleging, *inter alia*, that the TRT trustees had breached their fiduciary duty by selling the Denver buildings to SFREI at "fire sale" prices, and that SFREI (i) had aided and abetted this breach or, alternatively (ii) held the properties as a "constructive trustee," having purchased them with knowledge of the alleged breach. (5a-6a) After the former TRT trustees settled, TLT proceeded against SFREI alone. (6a)

B. *The Trial*

In 1986, a 14-day non-jury trial was held before Judge Sand of the United States District Court for the Southern District of New York. (7a) Judge Sand heard sixteen witnesses, all but two of whom were called by TLT. The witnesses included not only the former TRT trustees, but also real estate valuation experts presented by both sides.

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[4] The district court explicitly found that SFREI's offer was the best offer available. (32a, 48a)

[5] Thus, as both the district court and the court of appeals found, plaintiff-petitioner TLT is, in effect, the "defeated tender offeror." (5a, 120a)

On August 26, 1986, Judge Sand ruled in favor of SFREI on all issues. (13a *et seq.*) Based upon the expert testimony he had heard, Judge Sand concluded that there had been no "fire sale," and that the prices paid by SFREI for TRT's Denver properties were fair and reasonable. (38a-49a) Judge Sand also found significant the facts that none of the other potential "white knights" contacted by TRT was willing to offer more than SFREI (32a, 39a-40a) and that BCG's principals declined to bid for TRT's most valuable building when it was offered to them, shortly after their tender offer, at a price substantially below what they claimed to be its true value. (41a-42a)

In addition, Judge Sand found that (1) the former TRT trustees had not breached any fiduciary duties, but rather had acted independently, reasonably and with due care in rejecting the BCG bid and accepting the higher competing SFREI offer, which was the highest and best offer received by TRT; and (2) even if, contrary to his findings, the TRT trustees had breached their fiduciary duties, SFREI did not have the requisite knowledge of such breach to make it liable as an aider and abettor or "constructive trustee." (27a-33a; 49a-55a)

C. *SFREI's Post-Trial Claim For Attorneys' Fees and Expenses*

Immediately following Judge Sand's decision on the merits, SFREI applied to the district court for an award of its reasonable attorneys' fees and expenses from TLT pursuant to the terms of identical "prevailing party" clauses appearing in each of the four purchase-and-sale agreements between SFREI and TRT relating to the four Denver properties which had been the subject of the lawsuit. TLT opposed this application on the ground, *inter alia*, that SFREI and its counsel were guilty of "unclean hands" because they had allegedly "concealed" facts and had made a "material misrepresentation" to the court in 1982 and early 1983 in connection with a motion to dismiss for lack for personal jurisdiction.

On October 24, 1986, in an opinion reported at 645 F. Supp. 920 (S.D.N.Y. 1986), Judge Sand held that SFREI was entitled to recover its fees and expenses. Judge Sand explicitly rejected

TLT's claims regarding SFREI's personal jurisdiction motion, stating:

> Finally, we reject TLT's claim that SFREI is "guilty of unclean hands" because it concealed "true facts" when it moved early in this litigation to dismiss the complaint for lack of personal jurisdiction. See Plaintiff's Memorandum of Law at 12. This Court ultimately rejected SFREI's lack of personal jurisdiction defense. *However, SFREI's assertion of this defense does not constitute "unclean hands" and thereby warrant denial of its motion for attorney's fees.*

645 F. Supp. at 925 (emphasis added).

In accordance with Judge Sand's directions in his October 24 ruling, SFREI thereafter filed a detailed fee application, to which TLT filed specific objections, including an objection to any recovery of fees for SFREI's personal jurisdiction motion. In an unpublished opinion dated April 15, 1987, Judge Sand ruled on TLT's objections and held that SFREI's fee application should be reduced in certain limited respects, including the elimination of fees relating to the personal jurisdiction motion. The court then directed SFREI to submit a revised fee application in accordance with its rulings. SFREI's revised fee application was filed May 15, 1987, and sought over $1.5 million in attorneys' fees.

D. *TLT's Motion for Sanctions*

On June 22, 1987, in response to SFREI's revised fee application, TLT filed a motion for sanctions, claiming, once again, that SFREI's assertion by motion of its personal jurisdiction defense in 1982 and early 1983 constituted a "fraud on the court" and warranted complete denial of SFREI's contractual right to attorneys' fees. Although recognizing that Judge Sand had already rejected this argument in his October 24, 1986 opinion, TLT pointed to a truncated portion of a quotation from Judge Sand's April 15, 1987 opinion, in which Judge Sand stated that SFREI's personal jurisdiction motion was "entirely devoid of merit"; TLT attempted to argue that this language supplied a new ground for overturning SFREI's entire fee award.

This argument was wholly disingenuous, as was obvious from the full text of the quote, which appears at page 4 of the district court's April 15, 1987 opinion. There, speaking of SFREI's personal jurisdiction argument, the court stated:

> Although *we rejected TLT's claim that SFREI lacked "unclean hands" because it asserted this claim (with the alleged consequence urged by TLT but rejected by the Court, that SFREI forfeited any right to recovery, see* Opinion, October 24, 1986, p.12), we believe the claim was entirely devoid of merit.

(Slip Op. at 4) (emphasis added).

The full text of this quote makes clear that Judge Sand did not hold or even imply that SFREI's personal jurisdiction defense had been asserted in bad faith or through fraud or deceit, as TLT attempted to suggest. Rather, he simply found that it was an unsuccessful claim, the cost of which, on balance, should not be taxed against TLT.[6]

Not surprisingly, Judge Sand rejected TLT's sanctions motion in no uncertain terms, observing that this was "the third time" that TLT had requested him to rule on "essentially what are the same issues." (168a) Judge Sand stated:

> First, with respect to the motion by Terrydale Liquidating Trust for Rule 11 sanctions with respect to the assertion of jurisdictional defenses by SFREI which the Court determined to be "devoid of merit," that motion is denied, and as I indicated in my colloquy with counsel, I considered sua sponte, when this issue was previously raised, what sanctions would be appropriate

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[6] Petitioner now quotes the "entirely devoid of merit" language once again, in support of its argument to this Court. (Pet. Br. 4) Yet TLT fails to provide the full quotation, which makes clear that Judge Sand gave no credence whatsoever to TLT's "unclean hands" or "fraud on the court" allegations. Such tactics come with ill grace from one who freely accuses reputable lawyers of misconduct.

> in the total context of this litigation, and nothing has been called to my attention which convinces me that the sanction that I adopted, which was to deny SFREI's application for attorneys' fees for time expended in connection with that application, was incorrect.

(194a-195a).

E. *TLT's Motion to Reopen Discovery*

In addition to its disingenuous sanctions motion, on August 7, 1987 — more than a year after the close of the trial — TLT moved for discovery regarding SFREI's agreement to pay the attorneys' fees of certain witnesses at trial. (143a) TLT contended that such agreement constituted "witness tampering" in violation of the federal anti-bribery statute, was a violation of the Code of Professional Responsibility, and was a "fraud on the court," requiring a new trial and, of course, denial of SFREI's fee award.

The undisputed facts regarding this matter in no way support TLT's claims. SFREI made no payments to any witnesses, but did pay the fees and expenses of two law firms — Williams & Connolly of Washington, D.C. and Polsinelli, White & Vardeman of Kansas City — for representing the former TRT trustees[7] and Michael Gramlich and James Kostoryz in connection with their preparation for and testimony at the trial. (146a-147a, 159a, 161a)[8]

SFREI agreed to make these payments at the request of representatives of these two firms — Steven M. Umin, Esq. of Williams & Connolly and David A. Welte, Esq. of the Polsinelli firm — who had represented the TRT trustees continuously since before the BCG tender offer in 1981. They contacted SFREI's counsel prior to the trial, explained that they doubted whether their clients would be willing or able to pay the legal fees and expenses that would be incurred for preparing them for their

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[7] The former TRT trustees were J. Russell Gramlich, his son John J. Gramlich, J. Harlan Stamper, John D. O'Flaherty and Thomas J. Murphy.

[8] These fees and expenses totaled $26,714.15 for Williams & Connolly, and $25,052.33 for the Polsinelli firm. (146a, 159a, 161a)

testimony and representing them at trial, and asked if SFREI would be willing to pay these costs. (146a) SFREI agreed, because it believed that the trustees should have the benefit of Messrs. Umin's and Welte's independent counsel in connection with their trial testimony, since these two lawyers were thoroughly familiar with the background of this litigation, were well known to the trustees and had represented them previously in this litigation and predecessor actions. (147a)

At no time was there ever any discussion, or even the suggestion, that SFREI's willingness to cover Messrs. Umin's and Welte's fees and expenses was contingent in any way upon the testimony of their clients or the outcome of the trial. (147a, 159a, 161a) Messrs. Umin and Welte functioned completely independently in their representation of their clients at the trial, and no one connected with SFREI had any contact with these witnesses regarding the litigation, discussed with them any testimony they might give, or attempted to influence their judgment or conduct in any respect. (*Id.*) Finally, no one from Skadden Arps, SFREI's counsel, ever had any contact whatsoever with any of the former TRT trustees, Michael Gramlich or James Kostoryz, other than seeing and examining them in court at the trial and at their depositions noticed by TLT. (147a)

At the trial, TLT's counsel examined these witnesses extensively on the subject of the payment of their legal fees. As their trial testimony clearly shows, none of the witnesses knew, at the time of the trial, that SFREI had agreed to pay their lawyers' trial-related fees and expenses. (149a-157a) Moreover, Messrs. Umin and Welte swore in affidavits that they never advised the TRT witnesses of the fee arrangement prior to or during the trial, and they believed that the witnesses were unaware of the arrangement. (159a, 161a-162a)

Significantly, during all of the trial testimony, the lawyers for the witnesses — Messrs. Umin and Welte — were present and available in the courtroom. TLT's counsel was obviously free to call them to the stand and inquire as to the payment of their fees. TLT's failure to make such an inquiry of these two lawyers

can only be construed as a tactical decision designed to give TLT the basis for a later motion if its case was rejected on the merits.

At a lengthy hearing on August 27 and 28, 1987, Judge Sand firmly rejected TLT's motion to re-open discovery on the attorneys' fee issue, as well as a last-ditch motion for a new trial, based on the same grounds, that the court had permitted TLT to make orally. (*See* hearing transcript at 167a *et. seq.*)

With respect to TLT's motion for discovery, which the court treated as "a discovery motion in support of a contemplated motion to set aside a fact-finding in a civil case" (195a), the court held:

> The discovery motion is denied on several grounds, the principal ones being that, assuming the truth of the allegations, the Court does not perceive how it could have impacted on the ultimate determination on the merits which the Court made in the case tried to the bench.
>
> The relationship of the witnesses to the parties, where their sympathies lie, where they perceive their self-interest to lie, was quite apparent during the course of the trial to the Court. It certainly should have been quite apparent to Mr. Bender [TLT's counsel]. *And if he had thought that the matter was worth pursuing further at the trial, he had the opportunity to do so.*

(195a-196a) (emphasis added).

With respect to TLT's motion for a new trial, Judge Sand held:

> As the Court indicated in colloquy yesterday, and as was reiterated in the colloquy with counsel for TLT just a few moments ago [211a-212a], no one in this courtroom was under any illusion or misapprehension as to the allegiance or loyalties of the witnesses whose legal fees have now been disclosed to have been paid by counsel for SFREI.

> Clearly, there is no need to grant a new trial if it would be a futile matter. In other words, this court is in position to determine what impact, if any, on the ultimate result there would be if the record were reopened, as I indicated, by TLT's counsel, the witnesses previously called, or the attorneys, were to testify to the fee arrangement that had been made. If the court had been fully apprised during the trial of an agreement by SFREI to pay these witnesses' legal fees, that knowledge *would not have altered in any fashion meaningful for purposes of this motion the Court's evaluation of these witnesses' credibility nor the ultimate outcome of the case.*
>
> • • •
>
> Counsel for TLT has argued that with that information before the court different inferences would be drawn. As I have already stated, the court was at all times during this litigation aware of the loyalties and allegiances of the witnesses, and *the fact that legal fees were being reimbursed would not have altered the Court's evaluation of the testimony of those witnesses, nor, surely, would it have altered the ultimate result.* Accordingly, the motion [for a new trial] is denied.

(214a-215a) (emphasis added).

Ultimately, the district court viewed petitioner's motions for what they were — tactical devices born of frustration and TLT's desire for delay. Judge Sand stated:

> There must be an end to this matter, and the Court has regretfully reached the conclusion that the desire for delay, plus other emotional aspects which have entered into this case, are motivating such an application [for a new trial].

(196a).

F. *The Second Circuit's Per Curiam Affirmance*

On May 12, 1988, the Second Circuit, in a *per curiam* opinion, affirmed Judge Sand's "comprehensive and well-reasoned opinion" (7a), stating that his factual findings were "amply supported by the record" and agreeing with his legal conclusions and rulings "substantially for the reasons given by him therefor." (9a) The Second Circuit also affirmed Judge Sand's rulings on TLT's sanctions motion and "witness tampering" claim, finding both of them to be "without any merit whatsoever." (9a)

REASONS FOR DENYING THE PETITION

I. *The Petition Does Not Raise Any Question of "Paramount Public Importance"*

In both the district court and the Second Circuit, TLT argued that SFREI's agreement to pay the fees of the lawyers for the former TRT trustees violated the federal anti-bribery statute, 18 U.S.C. § 201, and the Code of Professional Responsibility. TLT retreats from these claims in its Petition. Instead, TLT resorts to mischaracterizing the conduct in the most inflammatory terms, and then simply contends that the Petition raises questions of "paramount public importance." (Pet. Br. 7) Nothing could be further from the truth.

As shown in Point II, below, the agreement to pay the legal fees of the TRT trustees does not violate any criminal provision or ethical proscription, or any other rule of law. To the contrary, it is expressly permitted. Moreover, as the district court repeatedly stressed, it was not "deceived" or "defrauded" by the non-disclosure of the agreement, since it always viewed the witnesses as "essentially hostile" to TLT and thus the fee agreement, even if known, would not have altered its decision on the merits in any respect.

Similarly, as shown in Point III, the Petition does not raise any important question regarding SFREI's assertion of its personal jurisdiction defense. The district court was obviously in the best

position to determine whether it had been "deceived" or "defrauded" in connection with this matter. It concluded on three separate occasions that it was not, and the Second Circuit agreed.

Finally, as shown in Point IV, TLT's claim that the "integrity of the judicial process" (Pet. Br. 8) has somehow been offended is absurd. The real issue here is how much longer TLT should be allowed to impugn the reputations of respected law firms and lawyers in what is simply a desperate effort to upset SFREI's judgment on the merits and its $1.5 million contractual fee award.

II. *The Fee Agreement Did Not Constitute "Witness Tampering" and Did Not Violate Any Criminal Provision or Ethical Rule*

There is no statute, case or ethical rule that proscribes the payment of the legal fees and expenses of counsel for a witness. 18 U.S.C. § 201(c)(2), to which TLT refers on page 9 of its Petition — without so much as a single supporting case citation — proscribes the giving, offering or promising anything of value to any person "*for or because of*" that person's trial testimony (emphasis added). A violation of this section obviously requires a connection between the payment (or offer of payment) to the witness and the testimony of the witness; there must have been a gift, award or gratuity *by reason of* some act performed or to be performed by the witness. *See United States v. Irwin*, 354 F.2d 192, 196-198 (2d Cir. 1965) (construing §201 prior to the 1986 redesignation of its subdivisions), *cert. denied*, 383 U.S. 967 (1966).

No such connection existed in this case. The payment of attorneys' fees was not contingent in any respect upon the content of the witnesses' testimony or the outcome of the trial. Indeed, the witnesses' testimony makes clear that they were not even aware that SFREI had agreed to pay their lawyers' fees. Since SFREI's payment of the attorneys' fees here was not, in the words of the statute, "for or because of" the witnesses'

testimony – *i.e.*, it was entirely unconditional – there can be no liability under Section 201(c)(2).

Similarly, SFREI's conduct does not implicate any provision of the Code of Professional Responsibility. The only Code provision even remotely on point is Disciplinary Rule 7-109(C), which only prohibits payments to a witness which are contingent upon the content of his testimony or the outcome of the case. Since no such contingent payment was made here, that Rule does not apply.[9]

In fact, DR 7-109(C) expressly permits payment of "expenses reasonably incurred by a witness in attending or *testifying*" at a trial (emphasis added). Similarly, EC 7-28, an Ethical Consideration promulgated under Canon 7, expressly permits the "reimbursement for expenses and financial loss incident to" testifying as a non-expert witness. Nothing in either the Disciplinary Rule or the Ethical Consideration suggests that "reimbursement for expenses" was meant to exclude the reasonable attorneys' fees of the witness' lawyer. To the contrary, at least two state bar ethics opinions have held that DR 7-109(C) authorizes the payment of a witness' attorneys' fees.

In Alabama Bar Ass'n Disciplinary Commission Ethics Op. 82-699 (1983) it was held that payment of a witness' attorneys' fees for consultation and attendance at a deposition would not be an "ethical impropriety" under EC 7-28 or DR 7-109(C) because such fees are a "legitimate out-of-pocket expense." Such a payment would be impermissible only if the attorney for the party willing to pay the fees (1) has knowledge or reasonable cause

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[9] It bears repeating that, not only was there no contingent fee arrangement here, but the witnesses themselves were unaware of any agreement *of any nature* to pay their lawyers' fees. (149a-157a, 159a, 161a-162a) The witnesses' lack of knowledge has independent legal significance. *See New England Tel. & Tel. Co. v. Bd. of Assessors*, 392 Mass. 865, 468 N.E.2d 263, 267-68 (1984) (holding that a tax board should not have disregarded the testimony of an expert witness on the basis of an alleged contingent fee arrangement because the evidence did not show that, at the time he testified, the expert had any belief or expectation that he then had a contingent fee arrangement).

to believe that a portion of the sum will be paid to the witness to influence the content of his testimony or (2) the payment is contingent on the content of the witness' testimony or the outcome of the case. As set forth above, no such circumstances existed in the present case.

In Florida Bar Informal Staff Op. TE083026 (1982), staff counsel advised that a party could properly pay a witness' attorneys' fees relating to that witness' obtaining immunity from prosecution. Since obtaining immunity was a prerequisite to the witness testifying at trial, such attorneys' fees were held to be expenses "reasonably incurred in attending or testifying" within the meaning of DR 7-109(C).

Petitioner asserts that Messrs. Umin and Welte became SFREI's "hired gun[s].... partners with or agents of SFREI in promoting the SFREI strategy." (Pet. Br. 10) Neither Judge Sand nor the Second Circuit gave any credence to this outrageous accusation, and with good reason. SFREI did not hand-pick these lawyers. To the contrary, they had represented the former TRT trustees for many years in connection with the very matters at issue in this litigation, and both of them swore in their affidavits that they acted completely independently in representing their clients during the trial. (147a, 158a-162a)

Judge Sand repeatedly rejected TLT's suggestion that he was "deceived" or "defrauded" by the nondisclosure of the fee agreement. The court also stressed its full awareness that the former TRT trustees were "essentially hostile" to TLT (212a), which was attempting to prove that they had committed a serious breach of their fiduciary duties. In fact, Judge Sand told TLT's counsel "You knew you were examining witnesses who, if to any extent they sought to color or provide nuances in favor of one side or the other," would favor SFREI. (211a-212a)[10]

Judge Sand concluded that, regardless of the fee arrangement, the TRT witnesses were credible, and he expressly stated: "If the

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[10] For precisely this reason, TLT's allegations throughout its Petition that the former TRT trustees were "its" witnesses are absurd. Had TLT not called these witnesses, SFREI would have done so.

Court had been fully apprised during the trial of an agreement by SFREI to pay these witnesses' legal fees, that knowledge *would not have altered in any fashion meaningful for purposes of this motion the Court's evaluation of these witnesses' credibility nor the ultimate outcome of the case.*" (215a) (Emphasis added) In effect, the Petition asks this Court to second-guess Judge Sand's findings in this regard, concerning matters which he alone properly should determine. The Second Circuit correctly rejected such an invitation, and this Court should do likewise.

III. *SFREI's Assertion of the Defense of Lack of Personal Jurisdiction Does Not Warrant Denial of SFREI's Contractual Attorneys' Fees*

TLT's claim that SFREI's assertion in 1982 and 1983 of the defense of lack of personal jurisdiction justifies wholesale denial of SFREI's contractual attorneys' fees has been explicitly rejected *four* times — three times by Judge Sand (on October 24, 1986, April 15, 1987 and August 27, 1987) and once by the Second Circuit. SFREI has always disputed, and continues to dispute, TLT's contentions regarding this matter. However, in light of the repeated rejections of TLT's claims, both by the fact-finder and the appellate court, SFREI does not believe it is necessary to respond to TLT's charges with any detailed factual refutation.

The important point is that TLT's claims of fraud and deception raise factual issues which were appropriately within the sound discretion of the district court to resolve. That court repeatedly rejected TLT's suggestion that it had somehow been "deceived" by SFREI's assertion of its jurisdictional defense. Judge Sand's rulings were affirmed by the Second Circuit, which agreed that TLT's claim was "without any merit whatsoever." (9a) The Petition simply seeks to reargue Judge Sand's conclusive factual determinations; it raises no issue of law or public policy worthy of certiorari.[11]

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[11] It is perhaps worth noting that TLT's long-arm jurisdiction claim was based on the negotiation in New York, by lawyers for SFREI, of an agreement that was collateral to one of the four purchase-and-sale agreements pursuant to which

(Footnote continued)

IV. *TLT's Claim That SFREI's Conduct Has Implicated the "Integrity of the Judicial Process" Is Without Merit*

Unable to point to a single legal issue worthy of certiorari, TLT argues that SFREI's conduct offends the "integrity of the judicial process" and demands a review by this Court. (Pet. Br. 8) This contention is simply ridiculous. It is premised on the fictitious assumption that some sort of fraud or deception actually occurred, when in fact Judge Sand repeatedly stated, and the Second Circuit agreed, that this was not the case.

The three cases cited by TLT on this point (Pet. Br. 8-11) are completely inapposite, since each one involved an affirmative finding of an actual fraud on the court, such as the manufacturing of evidence or perjury. *See Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944) (patent applicant in an infringement case submitted into evidence a "spurious" trade journal article, ostensibly signed by a disinterested expert, but which was actually authored by the applicant's own attorneys); *Phillips v. Crown Cent. Petroleum Corp.*, 556 F.2d 702 (4th Cir. 1977), (court found that plaintiff had committed perjury at depositions and at trial), *cert. denied*, 444 U.S. 1074 (1980); *Harre v. A.H. Robins Co., Inc.*, 750 F.2d 1501 (11th Cir. 1985) (expert witness

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TRT transferred its Denver real estate to SFREI. The purchase-and-sale agreements were negotiated in Kansas City and Denver, closed in Denver and were governed by Colorado law. It is far from clear that the minimal activities taken in New York with respect to a single collateral agreement were or are sufficient to confer jurisdiction under Section 302(a)(1) of the New York Civil Practice Law and Rules over SFREI, a California business trust which did no business whatsoever in New York, and its directors. *See, e.g., McShan v. Omega Louis Brandt Et Frere, S.A.*, 536 F.2d 516, 518 (2d Cir. 1976); *Fontanetta v. American Bd. of Internal Medicine*, 421 F.2d 355, 357 (2d Cir. 1970); *Pavlo v. James*, 437 F. Supp. 125, 128 (S.D.N.Y. 1977); *Amins v. Life Support Medical Equip. Corp.*, 373 F. Supp. 654, 658 (E.D.N.Y. 1974).

Moreover, SFREI also disputes TLT's preposterous claims that Skadden Arps engaged in misconduct by (i) inserting in SFREI's answer a one-sentence defense of lack of personal jurisdiction and (ii) refusing to waive the defense in the pretrial order. (Pet. Br. 4) By so doing, Skadden Arps simply sought to preserve the defense for appeal.

found to have committed perjury at trial). These cases simply hold that when a fraud, such as perjury, has in fact occurred during the trial, the courts have an obligation to re-examine and, if warranted, set aside the verdict or decision. Here, Judge Sand examined TLT's inflammatory charges in detail and conclusively rejected them.[12]

Finally, it is also worth noting that, regardless of the fee arrangement, the court explicitly found that the prices paid by SFREI for TRT's Denver buildings were fair and reasonable and that no "fire sale" had taken place. (38a-49a) This finding was based not on the testimony of the TRT trustees, but on the testimony of the parties' real estate valuation experts and on the evidence of the "market place" (*i.e.*, the facts that SFREI's offer was the best available, and that eight sophisticated bidders examined TRT and refused to pay more than $33.50 for all of TRT's shares). Thus, there is simply no way that TLT's charges, even if taken as true, could have changed the outcome of this case.

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[12] TLT's other cases on this point are also irrelevant. In *Alexander v. Watson*, 128 F.2d 627 (4th Cir. 1942), the court held that an attorney who agreed to testify on behalf of his former client as a trial witness was not entitled to receive what was, in effect, a contingent fee for testifying. The attorney had balked at testifying until the receiver for the client promised that, if he testified, and the receiver prevailed at trial, the receiver would apply to the court for additional compensation for the attorney. The circuit court held that any agreement to pay such additional compensation, particularly given its contingent nature, was unenforceable. In the present case, the fee arrangement (i) was not contingent in any way upon the content of the TRT witnesses' testimony or the outcome of the trial; and (ii) was payment for the lawyers' actual time charges and expenses, *not* compensation for the witnesses' testimony.

In *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 545 F. Supp. 1314, 1369-1370 (S.D.N.Y. 1982), the court held that payments made *directly* to fact witnesses at trial may be relevant to a jury in assesing the witnesses' credibility. In the present case, SFREI did not make payments directly to any witnesses, but merely reimbursed their attorneys for their reasonable trial-related attorneys' fees, which, as set forth above, is entirely proper. Moreover, the witnesses did not have any knowledge of the agreement to pay such fees, so their credibility was not and could not have been affected. Finally, Judge Sand, as the finder of fact in the non-jury trial, held that even if he had known of the fee arrangement, it would not have affected his assessment of the witnesses' credibility, nor would it have affected the outcome of the case.

Conclusion

For the foregoing reasons, TLT's petition for a writ of certiorari should be denied.

Respectfully submitted,

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